UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION FOR A PROTECTIVE ORDER

Over the course of its now 11-year "enforcement initiative," EPA has sued at least 30 utilities for alleged New Source Review ("NSR") violations, but never sought a preliminary injunction or claimed "irreparable harm" from such violations. Doc. No. 46 at 23-24. Instead, EPA has proceeded in those cases with deliberation, with discovery periods often spanning years and usually on a schedule bifurcating liability and remedy into separate phases. Doc. No. 15 at 12-14. EPA has never explained why this case is so different that it should proceed on such an expedited track. Nor has EPA adequately explained why pre-hearing discovery is now warranted, when EPA initially insisted on its motion being heard almost two months ago.

Indeed, while this case involves work performed just *six months ago* at one unit, the vast majority of EPA's NSR cases involve work performed *more than a decade ago* at multiple units. Any alleged "excess" emissions in this case thus pale in comparison to those in other NSR cases. In any event, this Court ordered Detroit Edison to not "utilize [Monroe Unit 2] to any extent that is greater than it was utilized prior to the Project at issue." Doc. No. 29 at 1-2. This preserves the *status quo*, eliminates any possible irreparable harm, and renders pre-hearing depositions and a hearing on EPA's motion pointless. To the extent the Court believes a hearing is still necessary, EPA's efforts to take substantial discovery before that hearing should be rejected. This discovery would result in needless expense, impose an undue burden, and violate the Federal Rules of Civil Procedure governing the timing of expert discovery. Detroit Edison's motion for a protective order should be granted, and EPA's motion for a preliminary injunction should be resolved without further discovery and without an evidentiary hearing.

ARGUMENT

I. ANY FURTHER DISCOVERY OR HEARING ON EPA'S MOTION WOULD BE POINTLESS GIVEN THE CURRENT POSTURE OF THE CASE.

EPA claims Detroit Edison "has committed to address two of the three things [EPA]

sought in its complaint," Doc. No. 58 at 1, and concedes the only remaining question is whether the Court should issue a preliminary injunction requiring Detroit Edison to "reduce emissions across its fleet to offset the [alleged] unpermitted ... emissions from Monroe Unit 2 for the four years between June 2010 and 2014." Doc. No. 68 at 1. There is no need for further discovery or a hearing to address whether EPA is entitled to this relief at this preliminary stage in the case. It is not.

A. EPA is Not Entitled to the Preliminary Relief it Seeks.

This relief is not materially different than the final relief EPA requested and a district court rejected in another NSR case. After over ten years of litigation and a *final* determination of liability, EPA argued to the court in that case that the utility should be required to reduce its emissions at other units to compensate for NSR violations for various projects performed from 1989 to 1992. Like here, EPA asserted that the court should "order that ... future reductions come from *other* units in the same airshed ... that will eventually balance out the pollution [the utility] never would have emitted if it had followed the law." Plaintiffs' Proposed Conclusions of Law (Remedy Phase), filed in *United States v. Cinergy Corp.*, No. 99-1693 at 32 (S.D. Ind.) (excerpts attached as Ex. A); *id.* at 37 (utility should be "required to achieve emissions reductions from [these other] units ... that equal the excess emissions").

Following a remedy trial, the court rejected EPA's proposed remedy because EPA had not "proven that [the utility] violated any CAA provisions with respect" to the other units. *United States v. Cinergy Corp.*, 618 F. Supp. 2d 942, 967 (S.D. Ind. 2009). Nevertheless, EPA seeks to impose that same kind of punishment on Detroit Edison here, and seeks to do so in a truncated proceeding scheduled to be heard in just a few weeks—before any final determination of liability. There is no need for discovery or an evidentiary hearing to establish that EPA is not

entitled to this relief. *See, e.g., Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 4, 7 (D.D.C. 2006) ("Surely, plaintiffs are not seeking expedited discovery to gain evidence to get the court to preserve the *status quo*. They want to gather all the evidence they would need to radically transform the *status quo*, on an expedited basis. But, that is not the purpose of a preliminary injunction, nor of the limited discovery that the courts traditionally permit a plaintiff to have to secure it.")

B. The Court's Order Precludes any Possibility of Irreparable Harm.

EPA's motion should also be resolved without further discovery or evidentiary hearing because EPA cannot possibly establish irreparable harm from the alleged violations. This Court has already ordered Detroit Edison to not "utilize [Monroe Unit 2] to any extent that is greater than it was utilized prior to the Project at issue." Doc. No. 29 at 1-2. Hence, there cannot be any emissions increase above the pre-project baseline. At a minimum, this order preserves the *status quo*, and renders any further discovery or hearing on EPA's motion "manifestly pointless." *See, e.g., Big Time Worldwide Concert & Sport Club at Town Center, LLC v. Marriott Int'l, Inc.*, 236 F.Supp.2d 791, 794 (E.D. Mich. 2003) ("preliminary injunctions [may be] denied without a hearing, despite a request therefor by the movant, when the written evidence shows the lack of a right to relief so clearly that receiving further evidence would be manifestly pointless") (citations omitted).

II. EVEN IF A HEARING IS NECESSARY, EPA IS NOT ENTITLED TO THE DISCOVERY IT SEEKS.

Even if the Court deems that a hearing on EPA's motion is necessary, EPA's request to take deposition discovery should be rejected due to the burdens and costs it would impose.[1] At a

[1] Detroit Edison has never taken the position that preliminary injunction proceedings are "discovery-free zones." Doc. No. 68 at 3. As EPA knows, Detroit Edison opposed pre-hearing discovery in the circumstances of *this* case but agreed to the informal exchange of documents

minimum, the Court should preclude any depositions of Detroit Edison's potential expert witnesses consistent with Federal Rule 26(b)(4)(A), which governs the timing of expert discovery.

A. EPA's Pre-Hearing Discovery Would Impose an Undue Burden.

Contrary to EPA's opposition, there is no authority that provides EPA with the right to depose witnesses to prepare cross examination at a preliminary injunction hearing. Doc. No. 68 at 4. The case EPA cites for that proposition relates to the right to obtain information to prepare for *trial*. *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899 (6th Cir. 1998). By contrast, "[a] preliminary injunction is just that—preliminary. It does not substitute for a trial, and its usual office is to hold the parties in place until a trial can take place ...." *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004). Likewise, EPA's argument that it should not be forced to cross examine witnesses without first deposing them is not credible. Doc. No. 68 at 4. Under EPA's preferred schedule to have its motion heard in October 2010, EPA would have cross examined Detroit Edison's witnesses without first deposing them.[2]

In addition, EPA cannot contend the parties will be able to take as many as ten depositions over the next few weeks. As of this filing, there are 40 days remaining until the scheduled preliminary injunction hearing on January 19, and 15 of those days fall on weekends or holidays. Moreover, the parties' witnesses are geographically dispersed throughout the country. *See* Doc.

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and information in response to targeted requests from EPA. In response to requests over the past few weeks, Detroit Edison has provided EPA with documents and information as quickly as possible, including prior testimony and workpapers of several of Detroit Edison's potential witnesses.

[2] EPA told the Court in late August that Detroit Edison "ought to be prepared to respond [to its motion] in the time set by the local rules and the hearing date initially set by the Court." Doc. No. 23 at 8. Under this proposed schedule, Detroit Edison's opposition would have been due on August 31, 2010, and that motion would have been heard on October 13, 2010. Rejecting EPA's proposed schedule, the Court allowed Detroit Edison a period of 90 days, roughly equal to EPA's time, to respond. In turn, Detroit Edison and its counsel worked for several weeks and filed a 36-page opposition brief with nine declarations on November 4, 2010. Contrary to EPA's assertion, this hardly demonstrates an ongoing "campaign" by Detroit Edison to "defeat [EPA's] preliminary injunction motion without engaging on the merits." Doc. No. 68 at 7.

No. 66 at 8. Under normal circumstances, scheduling and taking these depositions in a few weeks would be impractical; during the upcoming holiday season, it would be even more difficult and burdensome.

B. Federal Rule 26(b)(4)(A) Precludes the Depositions of Detroit Edison's Potential Testifying Experts.

Even if the Court allows some limited deposition discovery in advance of any evidentiary hearing, it should not allow EPA to take the depositions of Detroit Edison's potential testifying experts. Doc. No. 66 at 8-10. These potential testifying experts are governed by Rule 26(b)(4)(A), and that rule only permits a deposition of an expert "after the [expert's] report is provided." EPA cites nothing persuasive to the contrary, and fails to adequately distinguish the Sixth Circuit's recent decision in *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 272-73 (6th Cir. 2010), addressing this very point.

CONCLUSION

For these reasons and for the reasons stated in Detroit Edison's opening brief, Detroit Edison's motion for a protective order should be granted, and EPA's motion should be resolved without any further discovery and without the need for an evidentiary hearing.

Respectfully submitted, this 10th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record as follows:

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This 10th day of December, 2010.

/s/ F. William Brownell

EXHIBIT A TO DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:99-cv-01693-LJM-JMS
	)	
CINERGY CORPORATION, *et al.*	)	
	)	
Defendants.	)	
	)	
	)	

PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW (REMEDY PHASE)

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582 F. Supp. 2d at 1060-61 ("Nothing in the CAA is a 'clear and valid legislative command' or raises a 'necessary and inescapable inference' that the full scope of the Court's equitable powers under § 113(b) is to be limited."). The excess emissions concept the Parties presented at trial is a useful way to measure the effects of the violations. Indeed, Cinergy counsel described the analysis as a "traditional 'but for' analysis" in opening statement. Trial Tr., Vol. 1-26:23-25 (Cinergy Opening Statement) (Feb. 2, 2009).

In this case, there is no method for removing Cinergy's pollution from the lungs of those who have breathed it or from the lands and waters downwind of the plant. The Court can order future reductions – *in addition to* the retirement of units 2, 3, and 5 – that will eventually balance out the pollution Cinergy never would have emitted if it had followed the law. In order to best match the communities harmed by Cinergy's violations and the benefit from mitigation, the Court can order that the future reductions come from other units in the same airshed. In this case, because Wabash River has other, uncontrolled units, the reductions can come from the very same smokestack.

1. Calculation of Excess Emissions

The Parties offered several ways to calculate excess emissions. Plaintiffs offered two affirmative calculations: the total illegal emissions from the units after the modifications and the

similarly makeweight. The Acid Rain program and NSR *each* require emissions reductions. Title IV, added by the 1990 Clean Air Act Amendments, created additional substantive requirements applicable to electric utilities while confirming the continued existence of requirements imposed by others parts of the Act. 42 U.S.C. § 7651*l*. ("Except as expressly provided, compliance with the requirements of this subchapter shall not exempt or exclude the owner or operator of any source subject to this subchapter from compliance with any other applicable requirements of this chapter."). *See also* PX-2018 (Wabash River Title V Permit) at Cinergy1369632 ("No provision of the acid rain program, an acid rain permit application, an acid rain permit, an acid rain portion of an operation permit . . . shall be construed as . . . exempting or excluding the permittee . . . from compliance with any other provision of the Clean Air Act, including the provisions of Title 1 of the Clean Air Act"). Additionally, the SO2 cap and trade program did not begin operations until 1995, while there was no NOX cap and trade program until 2004. FOF ¶ 214.

by Cinergy's violations is necessary to "give[] meaning to the statute's grant of enforcement authority." *U.S. Pub. Interest Research Group v. Atl. Salmon of Maine, LLC*, 339 F.3d 23, 31 (1st Cir. 2003).

a. Controls

New Source Review requires controls at particular sources because each source has an impact on a discrete geographical area. As Plaintiffs showed at trial, the harm from Wabash River has the greatest impacts on Indiana and surrounding states, though the harm also reaches as far as the Northeastern part of the country. These impacts have occurred in contravention of the Congressional PSD purpose "to assure that emissions from *any source in any State* will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality *for any other State*." 42 U.S.C. § 7470(4) (emphasis added). Simply shutting down Wabash River units 2, 3, and 5 does nothing to mitigate the historic impacts suffered in the areas affected by Wabash River's emissions. Additional controls – or other emission reduction measures – at the same facility – targeted to the levels of historic excess emissions – will provide a benefit to the harmed areas that is proportionate to the undue burden they have suffered due to Cinergy's failure to comply with the law.

Cinergy should be required to achieve emissions reductions from Wabash River units 4 and 6 that equal the excess emissions. These cumulative reductions can be achieved between the years 2010 and 2029. Plaintiffs' evidence demonstrates that these reductions could be achieved through the installation of a scrubber and SCR, though Cinergy should be allowed to use other methods if they can deliver sufficient reductions. The necessary reductions may be measured by comparing the actual emissions from units 4 and 6 to the pre-remedy baseline emissions in 2007:

Dated: March 3, 2009

Respectfully submitted,
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